INCHCAPE (M) HOLDINGS BHD.

v.

R.B. GRAY & ANOR.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
[CIVIL APPEAL NO. 39 OF 1984]
30 MARCH 1985

LABOUR LAW: *Industrial Relations Act 1967 s. 20(1) - Whether company director "a workman".*

ADMINISTRATIVE LAW: *Jurisdiction of the Industrial Court - Availability of order of prohibition and certiorari.*

ADMINISTRATIVE LAW: *Remedies - Prohibition - Order of prohibition against Industrial Court - Jurisdictional question.*

The appellant is a holding company with a number of subsidiaries within its group. The 1st respondent was offered employment by the appellant as a director of two of its subsidiary companies. He was put on terms and conditions made applicable to the appellant's expatriate staff. The 1st respondent was required to sign a Director's Contract of Employment. To effect his appointment as a director of the subsidiaries the necessary company resolutions were passed and the 1st respondent himself signed the requisite consent to act as a director. The contract of employment provided for termination of service with six months' notice or salary in lieu of notice. On 3 December 1979 the appellant purported to exercise this clause and terminated the services of the 1st respondent with six months' salary in lieu of notice. Thereafter, the Industrial and Agricultural Distribution Sdn. Bhd. of which he was the executive director passed the necessary resolution requesting the 1st respondent to vacate his office. The 1st respondent claimed that he was unfairly dismissed and lodged a complaint to the Director General of Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 for reinstatement to his former employment. Conciliation proceedings under the said section failed and the Honourable Minister of Labour referred the claim of the 1st respondent to the Industrial Court for adjudication under s. 20(3) of the Act. Before the Industrial Court the appellant raised a preliminary objection that the Industrial Court did not have the jurisdiction to adjudicate on the claim because the 1st respondent was' not "a workman" within the meaning of the Act. In a Preliminary Ruling on 26 August 1981, the Industrial Court ruled that the 1st respondent was "a workman" under the Act and that it had jurisdiction to adjudicate on the claim. The appellant applied to the High Court, *inter alia,* for an Order of Prohibition, upon obtaining leave of the High Court, to prohibit the Industrial Court from proceeding to adjudicate on the 1st respondent's claim on the grounds that the 1st respondent was not "a

workman" under the Act. The High Court dismissed the appellant's application for prohibition and ruled that it was within the jurisdiction of the Industrial Court to decide correctly or wrongly the question whether the I st respondent was "a workman". The appellant appealed to the Supreme Court. There were two issues before the Supreme Court (1) whether the 1st respondent is "a workman" within the meaning of the Act and (2) whether an erroneous decision of the Industrial Court on that question affects the jurisdiction of the Industrial Court.

Held:

(1) The 1st respondent is not "a workman" for the purposes of the Industrial Relations Act 1967.

Per Salleh Abas LP: "In my view the expression "as a workman" indicates the intention of the legislature in that in construing the term "workman", the purpose for which a person is employed must be taken into consideration. In other words, the function and responsibility of an employee are the criterion and must be looked into ... As a director the respondent on behalf of the companies of which he was a director, recruited employees of the companies and even terminated their services. With regards to the relationship between the appellant and their employees the respondent acted in the capacity of an employer and signed collective agreements on behalf of the appellant. Under the law as a director the respondent is the very brain of the companies or their directing mind determining and formulating the companies' policy. Thus, we cannot see how in the circumstances of this case, the respondent could be held to be a workman."

Per George Seah SCJ: "If a company director is to be regarded as representing the mind and will of the company and may not be treated as a servant of the company it would be strangely out of date nowadays to urge the Industrial Court to construe a company director, in the more complex conditions of modern companies, to include a "workman". Such a construction would place the company director in conflict with his duties and loyalty towards his employer and the company whom he represents. The proposition has only to be stated in order to make one realise how untenable it is. I am unable to accept it. In short the simple test appears to be this: If a person or a "company director" can be regarded either expressly or by necessary implication, as representing the company, he ought not to be treated as a workman under the Act."

(2) The error of the Industrial Court with regard to the question of whether the 1st respondent is "a workman" is a jurisdictional error which affected the jurisdiction of the Industrial Court. Upon a reference to it of a dispute the Industrial Court has a power to decide whether the dispute referred to it was a trade dispute or not or whether the aggrieved employee was "a workman" or not. *Assunta Hospital v. Dr. A. Dutt* [1981] 1 MLJ 304 explained.

Per Salleh Abas LP: "I do not think that it is absolutely correct in law to say that once the minister has referred a dispute, and the reference has not been impugned, the Industrial Court is seised with the jurisdiction and can do nothing else but to hear the dispute ... Of course, the Minister's act in making the reference is regular in the sense that he purports to act under the power given to him by the IRA, but it does it not preclude the Industrial Court from examining whether it has the jurisdiction to 'proceed or not."

Per Wan Suleiman SCJ: "In the instant appeal, the appellants maintain that the 1st respondent is not a workman. It would follow if it is right that the Minister should not have made the reference under s. 20(3). Would that mean, as was said by the Federal Court in *Assunta Hospital v. Dr. A.* Dutt [1981] 1 MLJ 115 that unless the Minister's decision is set aside, the Industrial Court is seised with jurisdiction, and must exercise this jurisdiction. I do not, with respect, agree with that view... If it should decide wrongly that it has jurisdiction to hear the reference on its merits, such decision is a nullity, and the ouster section will not apply. Such error would be error which affects jurisdiction, not merely error of law within its jurisdiction."

Per George Seah SCJ: "It is common ground that the Industrial Court is a creation of the Industrial Relations Act 1967 (as amended) and that it is an inferior tribunal with limited statutory jurisdiction with a "no *certiorari"* clause [see s. 33B(1)]. The phrase "inferior tribunal" is not used here in any offensive sense but merely means that the tribunal has a limited jurisdiction, usually in modern times defined by the statute which sets up I the tribunal. The words "final and conclusive" have been considered by the Courts a great number of times ... But those words do not oust the jurisdiction of the High Court from correcting the errors of the inferior tribunal by means by *certiorari* if the error affects the jurisdiction of the inferior tribunal where it exceeded or acted without jurisdiction so that its decision or order is a nullity *[Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 and *South East Asia Fire Bricks Sdn. Bhd.* case [1980] 2 MLJ 165]. In such a case, the "no *certiorari"* clause does not apply because there is in truth no order or decision of the inferior tribunal at all."

Observations on the scope of the order of prohibition.

[Appeal allowed Order of Prohibition to issue.]

Cases referred to:

Catherine Lee v. Lee's Air Farming Ltd. [1961] AC 12

Assunta Hospital v. Dr. A Dutt [1981] 1 MLJ 115; [1981] 1 MLJ 304

Rex v. National Arbitration Tribunal, Ex parte, Bolton Corporation [1941] 1 KB 584; [1941] 2 KB 405; [1943] AC 166

Simpson v. EBBW Vale Steel, Iron and Coal Company [1905] 1 KB 453(5) Bagnall v. Levinstein Limited [1907] 1 KB 531

Simmons v. Heath Laundry Company [1910] 1 KB 543

South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors. [1980] 2 MLJ 165

Ferwick v. Croydon Rural Sanitary Authority [1981] 2 QB 216
Attorney General v. Hanwell U.D.C. [1900] 1 Ch 51
Anisminic v. Foreign Compensation Commission [1969] 2 AC 147
Williams & Glyn Bank PLC v. Astro Dinaminco Compania Naviera SA [1984] WLR 438
Pearlman v. Harrow School [1979] 1 QB 56
Re Racal Communications Ltd. [1980] 2 All ER 634; [1980] 3 WLR 181
Westminster Corporation v. Gordon Hotels Ltd. [1907] 1 KB 910; [1908] AC 142
Hall v. Arnold [1950] 2 KB 543
OCBC v. National Union of Bank Employees & 2 Ors. [1984] 2 CLJ (Rep) 315
The King v. Blakeley, Ex parte Association of Architects etc. of Australia [1950 - 51] 82 CLR 54
Banbury v. Fuller 9 Exch. 111
Pease v. Chaytor 122 ER (KB) 233
Reg. v. Commissioners for Special Purposes of the Income Tax [1888] 21 QBD 313
Rex v. Shoreditch Assessment Committee, Ex parte Morgan [1910] 2 KB 859
R v. Fulham, Hammersmith & Kensington Rent Tribunal, Ex parte Zerek [1951] 2 KB 1
Reg. v. Negus [1873] 2 CCR
Hill v. Beckett [1915] 1 KB 578
Cassidy v. Ministry of Health [1951] 1 All ER 574
Bank voor Handel v. Slatford [1952] 2 All ER 957
Ready Mixed Concrete (S.E.) Ltd. v. Minister of Pensions and National Insurance [1968] 2 WLR 775
Market Investigations Ltd. v. Minister of Social Security [1969] 2 WLR 1
Nothingham Egg Packers & Distribution Ltd. v. MaCarthy & Haslett [1967] ITR 223
Adamson v. Arthur M. Smith (Hull) Ltd. [1967] ITR 302
Robinson v. George Sorby Ltd. [1967] ITR 147
Parsons v. Parsons [1979] IRLR 117
Seereelall Jhuggroo v. Central Arbitration & Control Board [1953] AC 151
Rex v. Board of Education [1909] 2 KB 1045
Maradana Mosque Trustees v. Mahmud [1967] 1 AC 13
Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [1984] 1 MLJ 363, [1984] 1 CLJ (Rep) 155
Bird v. O'Neal [1960] AC 907
Australia Mutual Provident Society v. Allan & Anor. [1978] 52 ALJR 407
Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] AC 705
H.L. Bolton (Engineering) Ltd. v. T.J. Graham & Sons Ltd. [1956] 3 All ER 624
Re T.N. Farrer Ltd. [1937] 2 All ER 505
Re Le Behrens & Co. Ltd. [1932] 2 Ch 46
Hutton v. West Cork Ry Co. [1883] 23 Ch D 654
National Associcition of Local Government Officers v. Bolton Corporation [1942] 2 All ER 425
The Queen v. Federal Court of Australia, Ex parte W.A. National Football League [1978-79] 143 CLR 190
Harrington v. Roots [1984] 2 All ER 474

Legislation referred to:
Industrial Relations Act 1967, ss. 20, (3), 22, 33A
Foreign Compensation Act 1950 [UK], s. 4(4)

For the appellant - C.V. Das (M. Nagarajah with him); M/s. Shook Lin & Bok
For the 1st respondent - D.P. Xavier; M/s. D.P. Xavier & Co.

JUDGMENT

Salleh Abas LP:

This is an appeal from the decision of Wan Hamzah J (as he then was) for refusing the appellant's application for an order of prohibition. The facts are as follows:

The appellant is a holding company and has a number, of subsidiaries within the appellant's group. Amongst the subsidiaries which are relevant to this case are Industrial and Agricultural Distribution Sdn. Bhd. (IAD) and Motor Association Sdn. Bhd. (MA).

The respondent, one Mr. R.B. Gray, was offered employment by the appellant on 23 February 1977 as Director of IAD and MA on the appellant's terms and conditions of service applicable to its expatriate staff. The respondent accepted the offer on 28 February 1977 and entered upon the employment on 16 March 1977. The necessary resolutions to make him director of IAD and MA were passed on 23 May 1977 with immediate effect and to complete the formality on the same date the respondent himself signed a consent to act as director. His contract of employment with the appellant was finally signed on 25 June 1977.

For a start everything went well between the parties. Later because of poor performance of IAD, the appellant decided to terminate the respondent's service and remove him from directorship and replace him with one Mr. J.J. Cregan. A letter terminating his service dated 3 December 1979 purporting to be written under paragraph 10 of the contract of employment was sent to him. This letter required him to hand over duties to Mr. Cregan and to complete the handing over by 5 January 1980. In accordance with para. 10 of the contract of employment, the respondent was given six months' salary in lieu of notice. On 2 January 1980 IAD passed a resolution that the respondent be requested to vacate his office by 7 January 1980 and Mr. Cregan be appointed Managing Director with immediate effect.

Aggrieved by the termination, the respondent wrote a letter dated 8 January 1980 to the Director-General of Industrial Relations requesting that officer to take the necessary action under s. 20 of the Industrial Relations Act 1967 (IRA) with a view to reinstatement on the ground that being a workman he was dismissed without just cause or excuse. Subsequently the complaint was referred by the Minister to the Industrial Court.

At the outset of the proceeding before the Industrial Court, the appellant raised a jurisdictional objection as a preliminary issue in that the respondent, being employed as a director, was not a workman within the meaning of the Act. The objection was over-ruled by the Court which made the ruling on 26 August 1981 whereupon the appellant applied to the Court to have the question referred to the High Court under s. 33A of the Act. On 31 May 1981 the Industrial Court refused the respondent's application for a reference to the High Court because the ruling it made on 26 August 1981 was not a complete award; it being only a ruling on preliminary objection.

Meanwhile, on 24 November 1981 the appellant applied to the High Court for leave to commence proceedings for an order of prohibition and *certiorari to* stop further proceedings in the Industrial Court and to quash the ruling it already made. Leave was granted on 30 July 1982 and the motion for *certiorari* and prohibition was heard on 21 March 1983. Finally, on 27 January 1984 Wan Hamzah J (as he then was) in a reserved judgment refused the appellant's application. Hence this appeal.

The appeal is confined to the learned Judge's decision on his refusal to issue an order of prohibition only; appellant having accepted the learned Judge's decision on *certiorari* in that it could not lie because the application was made outside the time limit, i.e. more than six months after the Industrial Court made its first ruling on 26 August 1981.

There are, however, two issues in this appeal. The first is whether the respondent is a workman within the meaning of IRA and the second is whether an erroneous decision of the Industrial Court on that issue is an error which affects the jurisdiction of the Court.

Is the respondent a workman?

The starting point for the consideration of this question is the definition of "workman" in the IRA, which is as follows:

> 'workman' means any person, including an apprentice employed by an employer under **a contract of employment** to work for hire or reward, and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has been led to that dispute.

According to this definition, a workman is a person employed under **"a contract of employment",** and in the case of a trade dispute, he is a person whose dismissal, discharge or retrenchment from employment leads to or is the cause of the dispute. But what is a contract of employment and what is a trade dispute?

Contract of employment is defined by the Act to mean "any agreement whether oral or 'in writing and whether express or implied, whereby the person agrees to employ an other **as a workman** and that other agrees to serve his employer **as a workman."**

And trade dispute is defined to mean any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment, or conditions of work of any such workman".

The combined effect of these definitions is that a person is a workman if the contract of employment under which he is employed requires him to serve his employer **as a workman** and in the case of a trade dispute a person is a workman if the dispute between him and his employer is connected with his employment. The definition, therefore, does not go very far and in fact it goes in circle. I am still left **as a workman** with the same question: who is a workman? But one thing is clear in that

whilst a contract of employment is part of the definition, it does not follow that every person who is employed under a contract of employment or being an employee of another is a workman. To be a workman a person must be employed **as a workman.** If he is employed in other capacity he cannot be a workman.

There can be no doubt that the relationship between the appellant and the respondent by virtue of the contract of employment dated 25 June 1977 was that they were master and servant, or employer and employee. But this fact is neither here nor there, because the important criterion is the capacity or purpose for which the respondent was employed. The contract of employment in this case says that the respondent was employed as a director. Surely, common sense tells me that a director and a workman are pole apart and not synonymous. A director occupies a special position in the company and has different type of responsibilities from those of an ordinary employee of the company. By specifying in the contract that the respondent was employed as a director the parties to the contract must have intended that the respondent was not to be regarded as a workman. On this ground alone I could hold that the ruling by the Industrial Court was erroneous.

Catherine Lee v. Lee's Air Farming Ltd. [1961] *AC 12, which was relied* upon by the Industrial Court, is not a good case to rely upon for two reasons: In the first place, the deceased who was held to be a "worker" within the meaning of s. 3(1) of the New Zealand's Worker's Compensation Act 1922 held a dual capacity. He was a governing director and also the controlling shareholder of a company and at the same time an employee of it; being employed as its chief pilot. It was in connection with his duties as the chief pilot that the issue of his widow's entitlement to compensation arose. All that the Privy Council decided was on the principle of the veil of incorporation in that a company being a separate entity from its shareholders and director was not precluded from employing him as its chief pilot. Thus he was held to be a "worker" because he was the company's chief pilot, and not because he was a director or shareholder. The second reason is that the definition of "worker" under the New Zealand legislation is not the same as the definition of "workman" under our IRA. Section 2 of the New Zealand Act defines a worker as -

> any person who has entered into or works under a contract of service ... with an employer ... whether remunerated by wages, salary or otherwise.

The first thing to observe is that there is no qualifying phrase as in the definition in our IRA which has the expression **"as a workman".**

A reference to the long title of the IRA clearly shows that "workman" cannot mean any person, who is employed under a contract of service or employment. The long title says:

> An Act to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

The first thing to notice is that if the intention of the legislature is to define **"workman"** to mean every employee who can show that he has a contract of service or employment, 'the long title of the Act would not have used the word **workmen**.

The word "employee" would have been appropriate and sufficient as it would also be more natural. Thus, the use of the word **"workmen"** is in my opinion a deliberate choice and highly significant. [emphasis is mine]

The definition of "workmen" in Trade Union Act 1959, is the same as that in the IRA except that the expression "contract of employment" is left undefined. This omission does not matter. The identicalness of the definition of "workmen" in these two pieces of legislation clearly shows the scope of IRA in that the Industrial Court should only deal with disputes between employers on the one hand and workmen on the other hand, whether they were members of a trade union or not. This is what s. 20 is all about.

In Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304, the Federal Court upheld the finding of the Industrial Court that one Dr. A. Dutt, a professional radiologist, who was employed under a contract of service was a workman. The Court rejected the narrow definition of workman adopted by Indian Courts because of the expression "in any industry" which is part of statutory definition of workmen in Indian Industrial Disputes Act 1947 is conspicuously absent from the definition under the IRA. In my view while I agree that the Indian cases do not apply, the reason for non-application is not so much attributable to the missing expression but rather to the markedly different words used in the Indian legislation as a whole, which is -

> 'workman' means any person employed ... in any industry to do any skilled or unskilled manual or clerical work for hire or reward ...

It is clear from the definition that a workman is restricted to manual workers, skilled or unskilled and clerical workers.

In giving a wide definition to the word workman" the Federal Court relied upon the case *Rex v. National Arbitration Tribunal, Exparte, Bolton Corporation.* This case first started in Divisional Court [1941] 1 KI3 584, then moved to the Court of Appeal vide [1941] 2 KB 405 and finally ended in the House of Lords vide [1943] AC 166.

In that case a local authority was empowered by s. 1 of the Local Government Staffs (War Service) Act 1939 to make up the remuneration of officers who ceased to serve them to engage in war service in H.M. Forces or civil defence to the level of the remuneration which they would have received if they had continued in their civil employment, after deducting the amount of their war service pay. When pressed for payment by the Association of Local Government Officers on behalf of the employees of Bolton Corporation, the latter refused to make the payment. The Association therefore referred the matter to the Ministry of Labour, whereupon the Minister in turn referred it to the National Arbitration Tribunal for adjudication. The ministerial reference was made under an Order called Conditions of Employment and National Arbitration Order 1940 (St. R & 0 1940 No. 1305), which empowered the Minister to refer any trade dispute for compulsory arbitration to the National Arbitration Tribunal; the object being to prevent interruption of work. Bolton Corporation objected to the reference on the ground that the difference between it and the Association was not a trade dispute because the officers and employees of the Corporation were not workmen. The Corporation, therefore, applied to the Divisional Court for an order of prohibition.

Article 7 of the Order defined "trade dispute" to mean "any dispute between employer and workmen or between workmen and workmen connected with the employment or non-employment or the terms of the employment or with the conditions of labour of any person".

The article also defined workman to mean "any person who has entered into or works under a contract manual labour, clerical work **or otherwise**, be expressed or implied, oral or in writing and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour.

These definitions were identical with the definitions contained in the Industrial Court Act 1919.

The Divisional Court [1941] 1 KB 584, consisting of Viscount Caldecote CJ, Tucker J and Atkinson J, dissenting, refused to grant the order of prohibition. The Lord Chief Justice held that the definition of "workman" was wide enough to include professional technical and administrative staff of the Corporation. The learned Lord Chief Justice, however, admitted that the interpretation he gave to the word has a somewhat "strained and unnatural meaning" (p. 592), but nonetheless that was the definition given by the Statute and he therefore had no choice. By this definition all that was needed to constitute a workman was a contract of service. Thus any person working under a contract of service with the Corporation was workman even though he performed neither manual labour nor clerical work. Atkinson J. on the other hand thought that not all officers could be held to be workmen in the ordinary sense of the word and that as the Corporation was not engaged in trade or industry, the dispute between them and their employees could not be a trade dispute, because trade dispute could only be a dispute relating to trade or industry. Although Tucker J seemed to hold the same view, he nevertheless thought that a local authority could be a party to a trade dispute and that it was up to the Tribunal to sort out who the workmen were and who were not.

In the Court of Appeal [1941] 2 KB 405, the decisions of the Divisional Court was reversed. MacKinnon LJ and Du Parcq LJ did not base their decisions on the definitions, but on a different principle entirely in that a local authority could not incur expenditure contrary to the statute which brought them into existence. The local authority's power under the 1939 Act was merely discretionary and the National Arbitration Tribunal therefore had no power to compel them to exercise it. It was only Bennett J. the third member of the panel who held that the definition of workmen could not be as wide as construed by the Lord Chief Justice.

Finally, in the House of Lords [19431 AC 166, the House reversed the decision of the Court of Appeal and restored that of the Divisional Court. Four Law Lords, Viscount Simon LC, Lord Atkin, Lord Wright and Lord Porter agreed to the definition of "workmen" given by the Lord Chief **Justice** whilst Lord Thankerton expressed reservation on the meaning of trade dispute. He thought that a trade dispute must be limited to a dispute in a trade or industry only and not outside it.

It is clear from the speeches of the Law Lords that the House was confronted with a dilemma between the need to require local authorities to comply with the national policy and public interest with regards to the country's war efforts *vis a vis* their

obligation towards their rate payers. According to Lord Wright the Local Government Staffs (War Service) Act 1939 and the Conditions of Employment and National Arbitration Order 1940 must be read together, (P. 189). They dovetail with each other and their combined effect produce the result which the Association contend, namely the employees of the Corporation were workmen and thus its dispute with the Corporation with regards to the employees, wartime pay was a trade dispute. Their Lordships reminded the Corporation of their duty to use their power under the Act "to give reasonable effect to the national policy, which is to encourage men to engage in war service and to relieve them from pecuniary anxieties if they do so." (p. 186). Thus, payment made under the Act would be regarded as "given for good **reasons** of national policy". (p. 187).

Unlike an employer who is a natural person, without the Act, it would *be ultra vires* for the corporation to pay these wartime salary differences: Thus, according to the Lord Chancellor, the Act "Puts the juristic entity in this respect the same position as a natural person', (p. 178). Lord Atkin went further and said:

> The local authority was thus placed in equal position with private employers, who clearly have a similar power and, provided with this power, I see no reason why the authority should not agree with its employees to exercise it. I see no reason for supposing that authority can only make the payment after considering the individual needs of each servant. The statute, I venture to suggest, has a much wider scope. The intention, I should have said, obviously is to further the public welfare by encouraging the war effort, to enable local authorities, like other good employers, to secure that their sergeants, when they undertake war service, are not worse off financially by their change of service. (p. 180).

Finally, the Corporation was reminded that it should turn their minds away "from a duty to the rate payers and direct them to a duty to the public at large." (p. 180).

Clearly the issue confronting the House in this case was the preponderance of national policy and public welfare over the sectional duty of a local authority towards its rate payers. However, the seemingly wide definition given by the House was justified by Lord Chancellor to be due to the statutory definition itself which did not even restrict it by the amount of wages or salaries paid to the employees, although he agreed with the Lord Chief Justice who sat in the Divisional Court below that according to its ordinary sense, the administrative, professional and technical officials of the Corporation were not "workmen". His Lordship said that they are workmen because:

> They are ... persons who have entered into contracts with the Corporation 'whether the contract be by way of manual labour, clerical work, or otherwise. (p. 176).

Lord Wright like Tucker J (who sat in the Divisional Court) was of the view that the wide definition given did not mean that every employee of the Corporation was "a workman" within the meaning of the order. This would have to be decided on facts by the National Arbitration Tribunal. The definition given was simply for the purpose of deciding "whether there should and nor should not be a prohibition ... All that I desire to say here is that "workman" as defined in the order does not, in my opinion, bear the limited meaning for which the respondents have contended." (p. 189).

Before the *National Arbitration Tribunal case (supra) there were a series* of decisions of English Court of Appeal which rejected a wide definition of workmen. In these cases the Court construed the definition with reference to ordinary and natural sense of the word.

In *Simpson v. EBBW Vale Street, Iron and Coal and Company* [1905] 1 KB 453, a certificated manager of a coal mine who was paid a yearly salary and who, though his duties required his presence in the mine, was not required to engage in manual labour, was held to be not "a workman within the meaning of the Workmen's Compensation Act 1897." Collins M.R. said:

> ... But the Act must be construed reasonably, and its main purpose is apparent on its face, although the definition makes it possible to apply it to a person not engaged in manual labour ... Are we to extend it so as to include a person whom no man of ordinary sense would so describe ... (p. 457). Unless a limit is placed upon the word "workman" in the sense which I suggest, there seems to be no logical halting-place which would not embrace solicitors and estate agents under that term. (p. 458).

Mathew and Cozens-Hardy LJJ, the other two members of the panel, agreed to this common sense approach and popular meaning attributed to the definition.

In *Bagnall v. Levinstein Limited* [1907] 1 KB 531, a science degree holder who was employed on a salary plus a commission on profits of any invention discovered by him was likewise held not to be a "workman" within the meaning of the Workmen's Compensation Act. Collins M.R. again said:

> ... the question what was the man employed to do. Was he employed as a workman or as a skilled adviser? (p. 541)

In *Simmons v. Health Laundry Company* [1910] 1 KB 543, a music teacher was similarly held by a County Court Judge not to be a workman within the meaning of the same Act. The Court of Appeal refused to say that the decision was erroneous. Cozens-Hardy, M.R. said that "it would be absurd to hold that a skilled music master who gives lessons to a pupil, either in his own house or in the pupil's house, is to be regarded as a 'workman' and the pupil as the 'employer'." (p. 548). Fletcher Moulton LJ said:

> It is true that as a matter of law it is not every contract of service that constitutes a person a workman under the Act, ... (p. 549).

In all these cases, the statutory definition of "workman" was admitted and practically identical to that contained in the Conditions of Employment and National Arbitration Order which was dealt with *in National Arbitration Tribunal case (supra).* The only difference is that these three cases had no implication of national policy. It is also interesting to observe that none of these cases was referred to in the judgments of the Law Lords in the *National Arbitration - Tribunal case (supra).*

Be that as it may, I do not consider that the definition given in the National *Arbitration Tribunal* case can be applied to our statutory definition in our IRA because the expression "or otherwise" is not part of our statutory definition and also because the case is purely dealing with the national policy and the obligation of the local authority.

Now let me turn to the definition of workman in our IRA. Although it may appear to be wide, in fact it is limited by its own definition of contract of employment, which means any agreement whereby (an employer) agrees to employ his employee as "a worker" and the (employee) agrees to serve his employer, (also) as "a workman". We were urged to disregard the expression "as a workman" in the definition of "contract of employment" as being a mere labelling. With respect, I cannot agree. I have no right to treat it as mere surplusage. It was included there for good measure just as the words "or otherwise" in the *National Arbitration Tribunal* case (supra) were held to extend the definition beyond the natural and commonsense meaning of the word "workman". In my view the expression "as a workman" indicates the intention of the legislature in that in construing the term & "workman", the purpose for which a person is employed must be taken into consideration. In other words, the function and responsibility of an employee are the criterion and must be looked into.

Now, let me look at the function of the respondent and the purpose for which he was employed by the appellant.

The letter of offer of employment and acceptance as well as the contract of employment clearly state that the respondent was employed as a director. Pursuant to this employment, the appellant took the necessary measures to have the respondent appointed as an executive director of IAD and a number of other companies within the appellant's group. As a director the respondent on behalf of the companies of which he was a director, recruited employees of the companies and even terminated their services. With regards to the relationship between the appellant and their employees the respondent acted in the capacity of an employer and signed collective agreements on behalf of the appellant. Under the law as a director the respondent is the very brain of the companies or their directing mind determining and formulating the companies' policy. Thus, I cannot see how in the circumstances of this case, the respondent could be held to be a workman. I hold that the ruling of the Industrial Court on this issue is clearly erroneous.

II. Jurisdictional Issue:

The next question is whether the error committed by the Industrial Court on this issue is a jurisdictional error in the sense that it affects the jurisdiction of the Court.

The IRA was passed for the regulation of the relations between employers and workmen and their trade unions. It would be an unjustifiable enlargement of the scope and object of the Act if persons who are not workmen are brought within the Act. The Industrial Court cannot go on to hear the complaint of the respondent by wrongly deciding that he was a workman when he was not. Wrong decision on the issue could not vest the Industrial Court with jurisdiction. The principle is in fact cited by the Federal Court in *Assunta Hospital case* [1981] 1 MLJ 115 at 116 where Chang Min Tat FJ delivering the judgment of the Court said:

> A Court cannot give itself jurisdiction by wrongly deciding the facts exist upon which the jurisdiction depends, unless it has been given jurisdiction to decide the facts.

That an erroneous ruling on the question of workmen affects the jurisdiction of the Industrial Court is clearly shown by the ratio decided in the *National Arbitration Tribunal case (supra).* The issue in that case was whether a prohibition would be issued to National Arbitration Tribunal and this depended upon the question whether the employees of the Bolton Corporation were workmen or not so as to constitute the dispute between the Association of these employees and the Corporation to be a trade dispute. The House of Lords and earlier the Divisional Court held that they were, and so a prohibition was denied. It was upon the affirmative answers to these two preliminary questions that the National Arbitration Tribunal was held to have the jurisdiction. A quotation from Lord Wright's speech makes the matter clear. His Lordship said -

> There is here a trade dispute within the terms of the order, the jurisdiction of the tribunal is, in my opinion**,** established. Holding as I do that the jurisdiction of the tribunal in the matter is established, I would allow the appeal and restore the order of the Divisional Court ... (p. 189).

Further even in the *Assunta Hospital case (supra)* it is implicit in the second judgment of the Federal Court [1981] 1 MLJ 304 that the wrong finding on the question of workman is a jurisdictional error, otherwise there is no necessity for the Court to deal with the question at all and come to the conclusion that the radiologist employed by the hospital was a workman. Since this case has caused a great deal of confusion in the Court below, it is necessary to deal with it in its proper perspective.

After the Industrial Court had ruled that the radiologist was a workman, Assunta Hospital came to the High Court and asked for a prohibition to prevent the Industrial Court from proceeding to hear the radiologist complaint [1980] 1 MLJ 96. Parties agreed that the only issue between them was whether the Industrial Court had the jurisdiction to hear the complaint. Azmi J (as he then was) ruled that the Industrial Court had the jurisdiction. According to him its jurisdiction was derived from the reference made by the Minister and unless the reference itself was impugned there was no way in which the Industrial Court could refuse to hear the referred complaint, because there is provision in the IRA where the Court can disregard a decision made by a Minister under s. 20(3) of the Act. Thus, he said, "the Industrial Court is seised with power to hear the dispute." (p. 97).

With respect, I am of the view that the learned Judge confused himself by equating jurisdiction with duty so that when there is no right to refuse to perform the duty, jurisdiction is established. Surely, it is a matter of commonsense that no duty should be performed if it is contrary to law. To say that the Court must hear the dispute and must make an award, because the Court has no right to refuse to do so is to misread the IRA itself. I would only refer to s. 20(4), which is as follows:

Where an award has been made tinder subsection (3), the award shall operate as a bar to any action for damages by the workman in any Court in respect of wrongful dismissal.

This subsection clearly shows that an award need not have to be made. This situation could arise after the Court has heard the complaint and found that there was no wrongful dismissal or that the dispute is not a trade dispute or that the complainant is not a workman.

Nevertheless the view of Azmi J was fully supported by the Federal Court decision [1981] 1 MLJ 115. Chang Min Tat FJ who delivered the judgment of the Court practically reiterated that view and said:

> Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seised with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may well result in an order for *mandamus.* (p. 116).

The learned Judge also considered it a dereliction of duty to renounce the jurisdiction to hear the reference.

Thus seen, i.e. because jurisdiction is based on the ministerial reference and the Industrial Court cannot refuse to hear the reference, every question as to whether or not the complainant is a workman, or whether the dispute was a trade dispute or not, therefore could only be an error of law within the Jurisdiction and not an error of law affecting the jurisdiction. This, however, is the submission of Mr. Xavier, Counsel for the respondent, and this position seems to be implicit from the judgment of Azmi J and that of the Federal Court. Although both judgments said that the first question for the Industrial Court to decide is whether the complainant is a workman or not, nothing was said as to what the Industrial Court would do if it were to rule that the complainant is not a workman. In such an event, would the Court stop the hearing? If it would, why should it stop? On what ground? Surely, commonsense would tell us that the Court would certainly stop the proceedings and that it would do so not because in that event it is endowed with the power to defy the ministerial reference, but because to proceed further would be to act without jurisdiction. This clearly shows that the question as to whether a complainant who moved the minister to refer his complaint to the Industrial Court is a workman or not is a jurisdictional question, and that an error on this question affects the jurisdiction of the Industrial Court.

After the Federal Court refused to upset Azmi J's decision, the Industrial Court proceeded to make an award. This award was challenged on a *certiorari* by the Hospital. Hashim Sani J (as he then was), refused to quash the award because he held that the question as to whether the radiologist was a workman as determined by the Industrial Cout had become *resjudicata,* the same having been litigated before Amzi J and the Federal Court. As a result of Hashim Sani J's decision, the case once again came before the Federal Court. In this second appeal the Federal Court went into the question of workman and came out with a ruling agreeing with that of the Industrial Court in that the radiologist in question was a workman. ([1981] 1 MLJ 305).

If the question of workman is not a jurisdictional question, I do not comprehend the necessity for the Federal Court going into the question again and coming out with a ruling. One would wonder what would the judgment be if the radiologist was

held not to be a workman. Surely, if the error on this question were not one that affected jurisdiction, the Federal Court need not have to go into the question at all. It would be sufficient for it to accept the ruling of the Industrial Court, because the error being an error within the jurisdiction is immaterial.

Perhaps the confusion could be explained by the fact that when *Assunta Hospital case (supra)* came before the Federal Court for the second time, the Privy Council had just delivered its decision in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors*. [1980] 2 MLJ 165. This decision jolted the Malaysian judiciary into realising that not every error in law on the face of the record would deprive an inferior tribunal of its jurisdiction and that for an error to negate the jurisdiction it must be what is known as an error that affects the jurisdiction. Until *South East Asia Fire Bricks* case was decided it was generally understood that *certiorari* or prohibition would issue it there-was ail error of law on the face of the record. The case which overruled a number of Malaysian decisions, however, devided an error of law into two categories: error of law within the jurisdiction, and error of law affecting the jurisdiction. Only the latter category of error deprives an inferior tribunal of its jurisdiction. Lord Frazer of Tullybelton delivering the judgment of the Privy Council said:

> When words in a statute oust the power of the High Court to review decisions of an inferior tribunal by *certiorari,* they must be construed. strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or 'if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity' (per Lord Reid, at p. 171 *"in Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147. "But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective. (p. 167).

The question of law in *South East Asia File Bricks case (supra) upon* which the Industrial Court made the award, which was quashed by the Court but was restored by the Federal Court was whether workmen who had gone out on strike had terminated their contracts of employment. The Industrial Court held that the contracts were not terminated and, therefore, made the award. The High Court on the other hand held that the contracts were terminated and so on that basis quashed the award. But the Federal Court agreed with the Industrial Court and so restored the award. When the case came before the Privy Council, their Lordships, however, declined to make a ruling on that question altogether. Their Lordships said:

> Having regard to the opinion their Lordships have reached on the question of jurisdiction, they express no opinion on the question that was considered by the Courts in Malaysia. (p. 166).

Thus, it is clear that this legal issue was not considered to be a jurisdictional question.

The other possible error which could be made of the award was whether the dispute was a trade dispute. As to this their Lordships said:

> ... in the opinion of their Lordships there is no doubt that the dispute between the appellants and the respondents was a trade dispute within the definition in the Industrial Relations Act, 1967, s. 2. It was therefore a dispute which the Minister had power to remit to the Industrial Court under s. 23(2). - (p. 168).

It was, therefore, on the basis of no error on the question of trade dispute that their Lordships upheld the award. If there was an error on this question - i.e. it was not a tradedispute - the Industrial Court would have acted without jurisdiction and the award, therefore, could not have been upheld.

The reluctance of their Lordships to make a ruling on the question of termination of contracts clearly shows that this question, if there be an error, did not affect the jurisdiction. It was only an error within the jurisdiction. In fact the matter was covered by the following passage of the judgment:

For the present purpose their Lordships will assume, without deciding, that the award contained one or more errors of law upon its face. If so, the error or errors did not affect the jurisdiction of the Industrial Court ... (p. 168).

In other words, since the error, if there be any, was immaterial to the jurisdiction, there is no need to examine the correctness of the decision which is alleged to be in error.

In my opinion, since the question of trade dispute is considered by the Privy Council to be a jurisdictional question, the question of workman is similarly a Jurisdictional question.

I do not think that it is absolutely correct in law to say that once the minister has referred a dispute, and the reference has not been impugned, the Industrial Court is seised with the jurisdiction and can do nothing else but to hear the dispute. Such a wide statement is apt to be misleading and causing confusion. Being seised with jurisdiction does not mean that in every case the Industrial Court cannot determine whether it has a jurisdiction or not, nor decline to proceed further in the event that it is of the view that it has no jurisdiction. The Industrial Court has of course to look at the reference and despite the fact that the order of the minister still stands, it has the power to decide whether the dispute referred to it was a trade dispute or not, or whether the aggrieved employee was a workman or not, for only workman could become a party to a trade dispute. These are two vital questions which affect jurisdiction of the Industrial Court. To proceed further when it is not a trade dispute or when the employee is not a workman is to act without jurisdiction. Of course, the minister's act in making the reference is regular in the sense that he Purports to act under the power given to him by the IRA, but it does not Preclude the Industrial Court from examining whether it has the jurisdiction to proceed or not. Such examination under no circumstances could be held to be a defiance against the ministerial order or a dereliction of duty for which a *mandamus* could be issued. This right to examine the preliminary issue of jurisdiction need not have **to be expressly** conferred in the statute nor does it depend upon a statutory interpretation. Provision empowering the Industrial court to decline the hearing of a dispute as insisted by Azmi J. The right to examine its own jurisdiction is purely a matter of statutory interpretation.

The truth of the matter is that the reference by the Minister does not clothe the Industrial Court with jurisdiction. It is only a procedure of bringing the dispute for adjudication before the Industrial Court, but it is still open to the Court to see whether it has jurisdiction or not to deal with the matter if the issue is raised. It would indeed be startling if the reference must be heard irrespective of lack of jurisdiction.

That, in my view, the error made by the Industrial Court to the effect that the respondent was a workman is an error which is not just an error on the face of record but an error which affects jurisdiction.

Hence, I would allow the appeal. As regards costs, it is only fair that each party bears its own costs both here and below.

Wan Suleiman SCJ:

It will not be necessary for me to set out in detail the matters leading up to the present appeal in view of the fact that these have been fully set out in the Judgment of my brethren.

It would suffice for me to state that when the Industrial Court overruled the preliminary objection made by the appellant to the jurisdiction of the Court to entertain the reference on the ground that the first respondent was not a workman the High Court granted the appellant leave to apply for orders of *certiorari* and prohibition. The application for leave for an order of *certiorari* being out of time was not allowed by the High Court. The application for an order of prohibition was also dismissed by the High Court and this appeal is against that judgment.

The learned Judge held on the authority of *Assunta Hospital v. Dr. A. Dutt* [1981] 1 MLJ 115 that after the Minister had referred the dispute to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 (hereinafter referred to as the Act) it is not open to the appellant to challenge its jurisdiction on the ground that the first respondent was not a workman. The following passage from that judgment was cited by the learned Judge as authority for the proposition:

> Subject to the steps in section 20(2) to be taken for an expeditious settlement by conciliation and if such steps failed, the Minister may, if he thinks fit, refer the representations to the Court (i.e. Industrial Court) for an award. The discretion is with the Minister whether or not to make the reference. In the case under consideration we are not concerned with any question whether the Minister has or has not exercised his discretion correctly. If it should be such a case, the action is not to stop the Industrial Court from hearing the reference but by some application by which the order or reference can be impugned. Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may well result in an order for *mandamus* ... there can be, on a proper construction of this section, no doubt whatsoever that it would be a dereliction of duty to renounce the jurisdiction to hear the reference. In the exercise of its jurisdiction in a reference under section 20(3), the Court has a duty to come to a first finding whether or not the claimant was or was not a workman within the definition of a workman in the Act, and secondly whether or not the workman has been dismissed without just cause or excuse ...

The effect of that Federal Court decision is that once the Minister makes a reference to the Industrial Court under s. 20(3) of the Act it becomes properly seized with jurisdiction and if it should come to the finding, wrongly, that the first respondent is a workman, that is an error of law within tile jurisdiction then the ouster clause, s. 33B(l) of the Act makes its finding "final and conclusive".

I would with respect adopt the reasoning of my learned brethren that the 1st respondent is not a workman, and proceed forthwith to deal with the principal issue.

Had the learned Judge erred, as it was submitted on behalf of appellant he had, in not holding that the question whether the 1st respondent was a workman was a jurisdictional question, in consequence of which the ouster clause would not preclude review by the High Court?

A prominent feature of English public law has been the restrictive interpretation given by the Superior Courts to statutory formulae which read literally, would deprive them of their supervisory jurisdiction over inferior tribunals and administrative bodies.

The words "final and conclusive" have never been effective to abridge or attenuate judicial review. (See *Ferwick v. Croydon Rural Sanitary Authority* [1891] 2 QB 216 and A*ttorney General v. Hanwell U.D.C.* [1900] 1 Ch 51).

In the landmark case of *Anisminic v. Foreign Comp. Commission* [1969] 2 AC 147 a similar ouster or no *certiorari* Section was considered. Section 4(4) of the Foreign Compensation Act 1950 reads:

> The determination by the Commission of any application made by them under this Act shall not be called into question by any Court of law.

The House of Lords held that the word "determination" should not be construed as including everything which purported to be a determination but was not in fact a determination because the Commission had miscontrued the provisions of the Order defining their jurisdiction. Accordingly their Lordships held that the Court was not precluded from enquiring whether or not the order of the Commission Was a nullity.

The very meaning of the word "jurisdiction" seems to have caused difficulty in this appeal. Counsel for the appellant, in my view, was correct in concluding that the learned Judge had misconstrued the judgment of Lord Reid in the aforementioned decision when he held in his judgment (p. 303 of the record):

> The Industrial Court has the jurisdiction to decide correctly or wrongly the question whether the first respondent was a workman.

What that passage means is best obtained by setting the context in which it appeared; and reads:

> It has sometimes been said that it is only that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to either on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. it may have failed in the course of the inquiry to comply with the requirements of

> natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up' it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of' these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg. v. Go vernor of Brixton Prison, Exparte Armalt* [1968] AC 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of these things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the Court in certain circumstances to correct an error of law.

Therefore jurisdiction in the sense in which Lord Reid used the term should be confined to "the narrow and original sense of the tribunal being entitled to enter on the inquiry in question".

The House of Lords in *Williams & Glyn Bank PLC v. Astro Dinaminco Compania Naviera SA* [1984] WLR 438 offers yet another illustration of the two different kinds of jurisdiction *viz* (1) jurisdiction to decide the action on its merits, (which is the narrow sense in which Lord Reid had in mind) and (2) Jurisdiction to decide whether the Court had jurisdiction to decide the action on its merits, which I would hold is the jurisdiction in the wider sense exercised by the Industrial Court upon a reference by the Minister to it under s. 20(3) of the Act. In other words it has jurisdiction only to decide whether it has the jurisdiction to decide the matter on the merits.

This jurisdiction to decide whether it has jurisdiction would in this appeal depend on whether it correctly decides the question whether 1st respondent is a workman, and such decision is still subject to review.

In South East Asia Firebricks Sdn. Bhd. the effect of the ouster clause in s. 27(3)(a) of the Act, since amended, is substantially the same as the present s. 33B(1) (the provisions of s. 33A being irrelevant for the purposes of the present appeal) was also considered. The Privy Council considered the majority decision in *Pearlman v. Harrow School* [1979] 1 QB 56, 74 in which Lord Denning MR suggested that the distinction between an error of law which affected jurisdiction and one which did not should now be discarded. Their Lordships rejected this suggestion, preferring the dissenting opinion of Geoffrey Lane LJ when he said (at page 74):

> It follows from that reasoning that the only circumstances in which this Court can correct what is to my mind the error of the Judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of "structural alteration ... or addition.

In other words their Lordships of the Privy Council still maintain the distinction between a Court acting in excess of jurisdiction when *certiorari* would apply and one which makes an error of law within the jurisdiction when that remedy is ousted.

It would seem that the House of Lords, without saying so in so many words, was moving towards the majority view in *Pearlman's case.*

In *Re Racal Communications Ltd.* [1980] 2 All ER 634 the obiter view of Lord Diplock signals the move in that direction. I would set it forth in extenso:

> "I turn next to the question of the availability of judicial review instead of appeal as a means of correcting mistakes of law made by a Court of law as distinct from an administrative tribunal or other administrative authority, however described when it is exercising quasi-judicial functions. *In Anisininic [19691* 1 All ER 208; [19691 2 AC 147 this House was concerned only with decisions of administrative tribunals. Nothing I say is intended to detract from the breadth of the scope of applications to administrative tribunals of the principles laid down in that case. It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of *ultra vires.* It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a Court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for Courts of law to resolve in fulfilment of their constitutional roles as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer on administrative tribunals or authorities power to decide questions of law as well as questions of fact or administrative policy; but this requires clear words, for the presumption is that where a decision - making power is conferred on a tribunal or authority that is not a Court of law, Parliament did not intend to do so. **The breakthrough made by Anisminic was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purpose abolished**. Any error of law that could be shown to home been made by them in the course of reaching thier decision on matters of fact or of administrative policy would result in their having asked themselves the wrong questions with the result that the decision they reached would be a nullity.

See also the remarks made by the same Judge in *O'Reilly v. Mackman (H-L.(E)* [1983] 2 AC 237, at 278.

Be that as it may, it should not escape our attention that in *South East Asia Firebricks* the Privy Council found that the dispute between the parties was a trade dispute as defined in the Act, and that it was there a dispute which the Minister had power to remit to the Industrial Court (under s. 23(2)). There was therefore no question whatsoever that that Court had Jurisdiction to enter into the inquiry. Therefore it held that even if it were assumed that the award contained one or more errors of law, such error for or errors would be **within** the jurisdiction and the ouster section would apply.

In the instant appeal, the appellants maintain that the 1st respondent is not a workman. It would follow if it is right that the Minister should not have made the reference under s. 20(3).

Would that mean, as was said by the Federal Court in *Assunta Hospital v. Dr. A. Dutt (supra)* that unless the Minister's decision is set aside, the Industrial Court is seized with jurisdiction, and must exercise this jurisdiction.

I do not, with respect, agree with that view. It is not necessary here to decide on how the Minister's decision should be set aside. All I need say is that such order is the second sort of jurisdiction referred to in the *Williams & Glyn Bank's case (supra)* i.e. jurisdiction to decide whether the Court has jurisdiction to decide on its merits. It does not confer the first kind of jurisdiction, jurisdiction to decide on the merits.

If it should decide wrongly that it has jurisdiction to hear the reference on its merits, such decision is a nullity, and the ouster section will not apply. Such error would be error which affects jurisdiction, not merely error of law within its jurisdiction.

I would therefore allow the appeal and make the order prohibiting the Industrial Court from proceeding with the hearing of the 1st respondent's complaint.

George Edward Seah SCJ:

After the first respondent's employment was terminated by the appellants he made representations to the Director-General of the Ministry of Labour within the prescribed period that he had been dismissed without just cause or excuse by his employers and requested that he be reinstated in his former employment under subsection (1) of section 20 of the Industrial Relations Act 1967 (as amended). When a settlement could not be reached the Minister of Labour referred the matter to the Industrial Court for an award under subsection (3) thereof.

Before the Industrial Court, learned Counsel for the appellants raised preliminary objection to the jurisdiction of the Court to entertain the reference on the ground that the first respondent was not a "workman" - On 26 August 1981 the Industrial Court overruled the objection and held that the first respondent was a "workman" within the meaning of s. 2 of the Act. Following this ruling the appellants made two applications: one in the Industrial Court pursuant to section 33A of the Act and the other in the High Court under O. 53 Rule I of the Rules of the High Court 1980. The former application was disallowed by the Industrial Court while the High Court granted leave to the appellants to apply for orders of *Certiorari* and *Prohibition* of respectively. At the hearing in the High Court the learned Judge upheld an objection by learned Counsel for the first respondent that since the application for leave to apply for an Order of *Certiorari* was not made within six weeks after the ruling was delivered by the Industrial Court pursuant to O. 53 r. 1A thereof the matter was not properly before the High Court. There was no appeal against this ruling and learned Counsel for the appellants conceded (rightly in my opinion) that the decision of the learned Judge was correct. As regards the application for an Order of Prohibition this was dismissed by the High Court and this is an appeal against the judgment of the learned Judge.

This appeal concerns primarily with the extent of the jurisdiction of the Industrial Court under section 20 of the Industrial Relations Act 1967 (as amended). The principal question to be considered was whether the ruling given by it on 26 August 1981 that the first respondent was a "workman" was final and conclusive.

It is common ground that the Industrial Court is a creation of the Industrial Relations Act 1967 (as amended) and that it is an inferior tribunal with limited statutory jurisdiction with a "no *certiorari"* clause [see section 33B(1)]. The phrase "Inferior tribunal" is not used here in any offensive sense but merely means that the tribunal has a limited jurisdiction usually in modern times defined by the statute which sets up the tribunal.

The words "final and conclusive" have been considered by the Courts a great number of times. It has been uniformly held that they preclude any appeal to a higher Court in the sense an appeal proper where the Appellate Court reviews the decision of the inferior tribunal and substitutes its own decision for that of the interior tribunal (see *Westminster Corporation v. Gordon Hotels Ltd.* [1907] 1 KB 910 *and* [1908] AC 142 *and Hall v. Arnold* [1950] 2 KB 543). But those words do not oust the jurisdiction of the High Court from correcting the errors of the inferior tribunal by means by *certiorari* if the error affects the jurisdiction of the inferior tribunal where it exceeded or acted without jurisdiction so that its decision or order is a nullity (*Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 and *South East Asia Fire Bricks Sdn. Bhd.* case [1980] 2 MLJ 165). In such a case, the "no *certiorari"* clause does not apply because there is in truth no order or decision of the inferior tribunal at all.

In dismissing the application for an order of prohibition the learned Judge said at p. 306 of the Record of Appeal:

> When the Industrial Court considers and determines the question whether the first respondent was or was not a workman, it should do so not for the purpose of determining whether or not it has jurisdiction to hear the reference but for the purpose of determining whether the first respondent can be given what he asks for, i.e. reinstatement, because under section 20 he can successfully ask for reinstatement only if he was a workman ...

This passage appears to be at variance with the judgment of the Federal Court in the case of *Assunta Hospital v. Dr. Dutt* [1981] 1 MLJ 115 and the relevant part reads:

> Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seised with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction'... In the exercise of its jurisdiction in a reference under section 20(3), the Court has a duty to come to a first finding whether or not the claimant was or was not a workman within the definition of a workman in the Act and secondly whether or not the workman has been dismissed without just cause or excuse

In a later case of *OCBC v. National Union of Bank Employees & 2 Ors.* [1984] 2 CLJ (Rep) 315 the learned Judge seems to have accepted that he had misread the passage in *Dr. Dutt* case for he said at page 187:

> "It should be noted that the Federal Court was careful to use the words "jurisdiction to hear the case" and jurisdiction to hear the reference" when referring to the jurisdiction which the Industrial Court was seised with. In the judgment of the Federal Court it is not mentioned that once reference is made by the Minister the Industrial

> Court is seised with power to determine the dispute. I believe the significance of this is that when the Industrial Court is seised with jurisdiction to hear the reference, it is competent to hear and determine the dispute, for example the question of whether the respondent in that case was a workman, and if it was found by the Industrial Court that he was not a workman it should decide that it had no power to entertain the respondent's claim for reinstatement in employment.

in my opinion, this latter observation of the learned Judge represents the correct statement of the law governing section 20 of the Industrial Relations Act 1967 (as amended). Support for this view may be found in an opinion of the Chief Justice of the High Court of Australia, Latham C.J. in the case *of The King v. Blakeley, Exparte Association of Architects etc. of Australia* [1950 - 51 82 CLR 54 @ p. 69 - 70, where he said:

> in the first place, it was proper and necessary for the Commissioner to make a preliminary inquiry as to the existence of a dispute in order to make up his own mind whether he had jurisdiction to proceed to deal with the disputes or should abstain from proceeding *(Federated Engine-Drivers' and Firemen's Association of Australasia v. Brolcen Hill Pty. Co. Ltd.* [1911] 12 CLR @ p. 415 - 16).

Also at p. 306 the learned Judge continued:

> The Industrial Court has the jurisdiction to decide correctly or wrongly the question whether the first respondent was a workman.

It was submitted by learned Counsel for the appellants that the learned Judge appears to have misapprehended the observation of Lord Reid in *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147 @ p. 171 where the Law Lord said:

> But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that questions wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg. v. Governor of Brixton Prison, Exparte Armah* [1968] AC 192 @ p. 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the Court in certain circumstances to correct an error of law.

For the appellants it was submitted that the learned Judge erred it, law in failing to hold that the question of whether the first respondent was a "workman" was a jurisdictional question that went to the root of the Industrial Court's Jurisdiction so that if the Industrial Court decided that question wrongly it would have wrongly acquired jurisdiction when it had none. A number of authorities have been cited in support of this proposition. In *Banbury v. Fuller* 9 Exch. 111 @ p. 140 Coleridge J said:

> Now, it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up all together that subject matter which, if true, is within its

> jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior court. Then to take the simplest case - suppose a Judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented, the Judge must not immediately, forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not on the principal subject matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main question in consequence of an error, on this the Court of Queen's Bench will issue its *mandamus* or prohibition to correct his mistake.

This passage was quoted by Blackburn J in *Pease* v. *Chaytor* 22 ER (KB) 233 p. 240 - 241. In *Reg. v.* Commissioners for *Special Purposes of the Income Tax* [1888] 21 QBD 313, Lord Esher M.R. said at p. 319:

> When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exist and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more.

In Rex v. Shoreditch Assessment Committee, Ex parte Morgan [1910] 2 KB 859 @ p. 879 - 880, Farwell LJ said:

> The existence of the provisional list is a condition precedent to their jurisdiction to hear and determine, and as the claimant is entitled to require them to hear and determine, they cannot refuse to take the steps necessary to give rise to such jurisdiction; if they do, their refusal may be called in question in the High Court. No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure such a tribunal would be autocratic not limited - and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its jurisdiction is founded on law or fact; a Court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe.

Delvin J in *R v. Fulham, Hammersmith & Kensington Rent Tribunal, Ex parte Zerek* [1951] 2 KB 1 @ p. 10 said:

> When, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to their jurisdiction, the tribunal have to make up their minds whether they will act or not, and for that purpose to arrive at some decision on whether they have jurisdiction or not. If their jurisdiction depends upon the existence of a state of facts, they must inform themselves about them, and if the facts are in dispute reach some conclusion on the merits of the dispute. If they reach a wrong conclusion, the rights of the parties against each other are not affected. For, if the tribunal wrongly assume jurisdiction, the party who apparently an order from it in reality takes nothing. The whole proceeding is, in the phrase used in the old reports, *coram non judice.*

Lastly, in *Pearlman v.* Harrow *School* [1979] 1 QB 56 @ p. 69 Lord Denning M.R. said:

> It has been held that *certiorari* will issue to a county Court Judge if he acts without jurisdiction in the matter (see *Reg. v.* Hurst, *Exparte Smith* [1960] 2 QB 133). If he makes a wrong finding on a matter on which his jurisdiction depends, he makes a jurisdictional error; and *certiorari* will lie to quash his decision (see *Anisminic Ltd. v. Foreign Compensulion Commission* [1969] 2 AC 147 at p. 208 per Lord Wilberforce).

Having regard to these authorities it seems clear that the observation of the learned Judge cannot be supported. In my opinion, the statement is too ambiguous. It is settled law that a tribunal of limited jurisdiction Ethical has full jurisdiction to embark on an inquiry may yet act in excess of without jurisdiction if it makes an order or come to a decision which it has no power to make in that particular case, albeit the order or decision is of a type which the tribunal would be entitled to make in other similar cases (see *Anisminic case (supra)* per Lord Pearce at page 198).

I come now to deal with the most important issue of the appeal viz. whether the first respondent was a "workman" within the meaning assigned to that word by section 2 of the Industrial Relations Act 1967 (as amended).

The word "workman" has had a chequered history in the Courts in England and numerous cases have arisen over the years in interpreting this word. The importance of the word was recognized following the enactment of the English Workmen Compensation Act 1897 which introduced for that first time the principle of compulsory payment by employers of compensation in respect of death or disablement happening to a workman in. the course of his employment in the absence of proof of negligence or breach of a statutory duty imposed on the employers. The 1897 Act only applied to employment, of certain specified occupations but later Acts extended the principle to workmen with a few exceptions. Considerable amendments were subsequently made to the 1897 Act culminating in the passing of the Workmen Compensation Act 1952. As from July 5, 1948 the system of Workmen Compensation has been superseded by a scheme of national insurance. By the National Insurance (Industrial Injuries) Act 1946 most employees are "insured persons" and compensation or "benefit" as it is called now, in respect of industrial injuries is paid to the employees out of a fund to which both the employers and employees contribute. Thus the right to compensation or benefit is no longer an issue between

servant and master but the fruits of a contract of insurance, as it were, with the State. Instead of "workmen" the phrase is "all persons employed in insurable employment" is now used.

There was no real definition of a "workman" in the 1897 Act save that the term was stated to "include" certain classes of persons. However, in the 1925 Act the definition of "workman" is more exhaustive and the expression "contract of services" was first used in this Act. Under the 1925 Act "workman" means any person who has entered into or works under a contract of service or apprenticeship, with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing. When great strides had been made in the industries the English Parliament set up machinery to settle industrial disputes and differences with the passing of the Conciliation Act 1896 which was later replaced by the Industrial Courts Act 1919. For the purposes of the 1919 Act "trade disputes" means any dispute or difference between employers and workmen or between workmen and workmen connected with the employment or non-employment or the terms of the employment or with the conditions of tabour of any person. And "workman" is defined as "any person who has entered into or works under a contract with an employer, whether the contract is by way of manual labour, clerical work or otherwise, is expressed or implied, oral or in writing and whether it is a contract of service or apprenticeship or a contract personally to execute any work or labour".

Now, how did the English Courts deal with the question whether or not a person was a "workman"?

The traditional "control" test was laid down by Blackburn in *Reg. v. Negus* [1873] 2 CCR @ 37 and quoted by Avory J in *Hill v. Beckett* [1915] 1 KB 578 @ p. 582 and the question was whether the alleged servant was under the control and bound to obey the orders of the alleged master; if he was then the relationship of master and servant existed.

In *Cassidy v. Ministry of Health* [1951] 1 All ER 574 Somervell LJ observed that this traditional "control" test of the power of the master to direct how the servant should do his work was unrealistic nowadays and the Lord Justice correctly pointed out that there are many contracts of service where the master cannot control the manner in which the work is to be done as in the case of a captain of a ship. Denning LJ in *Bank voor Handel v. Slatford* [1952] 2 All ER 957 said at page 971:

> I would observe that the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization: see *Cassidy v. Ministry of Health (supra); Stevenson Jordon & Harrison Ltd. v. MacDonald & Evans* [1952] 69 RPC 10 both decided in 1951.

This *dictum* of Denning LJ was considered in *Ready Mixed Concrete (S.E.) Ltd. v. Minister of Pensions And National Insurance* [1968] 2 WLR 775 and applied in *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 WLR 1. The difference between a "contract of service" and a "contract for services" was fully discussed and explained in *Simmons v. Heath Laundry Company* [1910] 1 KB 543 which is essentially the distinction between a servant and an independent contractor.

Although a number of cases had been cited in the course of the appeal, with respect, I find no real help in them, concerned as they were with a different statute, worded differently and in a different context altogether. These authorities have no direct bearing on the point in issue since the statutory definitions of "workman" in these Acts were different from our definition contained in section 2 of the Industrial Relations Act 1967 (as amended). Besides, the law on this subject and the approach to it have developed very considerably since the last century.

In my judgment, the Industrial Court committed five fundamental errors of law when it decided that the first respondent was a "workman" within the meaning of section 2 of the Industrial Relations Act 1967 (as amended). Firstly, the Industrial Court seemed to equate "servant" and "employee" and "workman". This was plainly Wrong since "workman" under the Act is not synonymous with "servant" or "employee". The word "workman" has been statutory defined and has been given a special meaning whereas "servant" and "employee" are not used at all in the Act. The Industrial Court was wrong in law to decide the case based on "words which have not been used or defined in the Act". To do so would only cause confusion. Secondly, the Industrial Court erred in law to use the stock phrase "contract of service" instead of the expression "contract of employment" used in the Act. The term "contract of service" has resulted in uncertainty and litigations in the Courts in England and this is what Cozens - Hardy M.R has to say about it in the case of *Simmons v. Heath Laundry Company (supra)* a, page 547:

> I confess my inability to lay down any complete or satisfactory definition of the term "contract of service". Various tests were suggested by counsel, one of which was beyond criticism.

And at page 551-52: of the same case, Buckley LJ said:

> It is not, of course, every contract under which services are rendered that can be described as a contract of service. If I take a railway ticket the company enters into a contract with me to render me service, but there is no contest of service and the railway company is not my servant. A contract of service is one which necessarily involves the existence of a servant.

Thirdly, the Industrial Court was clearly wrong in law when it said at p. 88 of the Record:

> Under normal circumstances, once there is established a contract of service, then the issue of a "workman" would have ended there.

This statement appears to be contrary to a dictum of Fletcher Molton LJ at page 549 of *Simmons case* (supra):

> It is true that as a matter of law it is not every contract of service that constitutes a person workman under the Act (English Workmen Compensation Act 1906) since under the definition clause it must be a contract of service or apprenticeship with an employer whether by way of manual Tabour, clerical work, or otherwise.

Fourthly, the Industrial Court seems to have misconstrued the definition clause relating to a "contract of employment" when it said at page 89 of the Record:

> But there is nothing to preclude a company director from being a workman/employee of the company, provided that he has entered into a contract of employment, either orally or in writing, to serve the company and that the contract of employment when construed, establishes a contract of service.

The statutory definition makes it abundantly clear that the proper question to be asked is whether the employer has agreed to enter into a contract of employment to employ the person as a workman and that person has agreed to serve the employer as a workman. Thus the Industrial Court has failed to do.

Lastly, the Industrial Court appeared to rely on authorities which, in my opinion, have no relevance to the question which it was asked to decide, *viz*:

Can a company director be a workman within the meaning of the Industrial Relations Act 1967 (as amended)? -

The first case relied on by the Industrial Court is *Lee v. Lee's Air Farming Ltd.* [1961] AC 12. That was a case where the deceased was both the governing director and the company's chief pilot at a salary. He was killed in an air crash; the appellant lodged a claim for compensation against the respondent alleging that the deceased was a worker" within the meaning of the New Zealand Workers Compensation Act 1922. On appeal to the Privy Council it was held that a person may function in a dual capacity and acting in one capacity give orders to himself in another capacity. It further ruled that the contractual relationship between the deceased and the company was that of master and servant and as a contract of service was entered and operated upon the deceased was a "worker" within the statutory definition. Since the case appears to have been based on the interpretation of the word "worker" under the New Zealand Workers Compensation Act 1922 it has no relevance on the case before the Industrial Court.

Next, the Industrial Court referred to *Nothingham Egg Packers & Distribution Ltd. v. MaCarthy & Haslett* [19671 ITR 223 and *Adamson v. Arthur M. Smith (Hull) Ltd.* [1967] ITR 302 where the English Industrial Tribunal ruled that working directors who are also shareholders in the company are "employees" for the purposes of the Redundancy Payments Act 1965. In *Robinson v. George Sorby Ltd.* [1967] ITR 147 the *Tribunal also held that the applicant, who was managing director and controlling shareholder of the company was not an "employee" because there was no service contract in existence*. And in Albert J. *Parsons v. Parsons* [1979] 1 RLR 117 the Court of Appeal upheld a decision of the Industrial Tribunal that the respondent director was not employed by the appellant company under a contract of employment within the meaning of section 30 of the Trade Union and Labour Relations Act 1974 and that, as he was not therefore an "employee" he was not entitled to make a claim for unfair dismissal. Under the 1974 Act "contract of employment" is defined as a "contract of service whether it is express or implied and (if it is express) whether it is oral or in writing". It is clear that these cases are distinguishable from the present one in that they were dealing with the term "employee" where the definitions differ from ours and not "workman" within the meaning assigned to it in section 2 of the Industrial Relations Act 1967 (as amended).

Learned Counsel for the first respondent interpose to submit that if the Industrial Court had decided the question before it wrongly these errors of law were errors made within the jurisdiction and on the authority of *South East Asia Fire Bricks case (supra)* the jurisdiction of the High Court to interfere in such matter has been properly excluded by section 33B(1) of the Act, as it had not been denied that the Industrial Court had general jurisdiction to embark on the inquiry.

According to Lord Denning M.R. in *Pearlman case (supra)* at page 69:

> ... the distinction between an error which entails absence of jurisdiction - and an error made within the jurisdiction - is very fine. So fine indeed that it is rapidly being eroded ...

At page 70 the learned Master of the Rolls continued:

> ... I would suggest that this distinction should now be discarded. The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right ... to do justice to the complainant ... but also so as to secure that all courts and tribunals, when faced with the same point of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which Judge tries his case, or which court it is heard. The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will lie to correct it ...

This proposal of Lord Denning M.R. was rejected by the Privy Council in *South East Asia Fire Bricks case (supra)* at p. 167 in the following words:

> In *Pearlman v. Harrow School,* Lord Denning M.R. suggested that the distinction between an error of law which affected jurisdiction and one which did not should now be "discarded". Their Lordships do not accept that suggestion ...

Having regard to the conclusion reached by this Court, in my opinion, it is not necessary to decide this important point here but I desire to express that the Court as presently composed, is free to reconsider and if need be, to depart from it, where it arises at some future date.

Since the Act does not define what constitutes a "master" or "servant" the Industrial Court must be regarded to have made a finding not germane to the issue before it and had therefore neglected or refused to take into consideration something which it was required to take into account. In *Seereelall Jhuggroo v. Central Arbitration & Control Board* [1953] AC 151 Lord Porter in giving the judgment of the Privy Council said at page 162:

If then, the board, in coming to its determination, had neglected or rejected that consideration (that is, the guidance by the principle) it might well have been held to have exceeded its jurisdiction in taking it to be unfettered, whereas it was subject to a limitation of outlook but not confined to a particular proportion ...

And at p. 198 in Anisminic case (supra) Lord Pearce after referring to Seereelall case (supra) said.

The judgment makes it clear that an inferior tribunal which properly embarks on an inquiry, may go outside its jurisdiction if, in the course of that inquiry, it rejects a consideration which it was told to have in mind. It would then in effect be directing itself to an inquiry other than that which was laid on it by Parliament ...

When the Industrial Court asked itself the wrong question, to use the words of Lord Alverstone CJ in *Rex v. Board of Education* [1909] 2 KB 1045 @ p. 1061 the Industrial Court

> have not only not decided the question submitted to them, but have raised and made an order upon a matter never submitted to them ... or in other words, they have given themselves jurisdiction to determine the question in favour of the local authority by changing the question submitted to them into the one which we have quoted ...

In *Estate & Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [1937] AC 898 the Privy Council appears to have decided that the housing authority had acted beyond its statutory jurisdiction because it had in effect asked itself the wrong question (see *Anisminic case (supra)* at page 198 per Lord Pearce and see also *Maradana Mosque Trustees v. Mahmud [1967]* 1 AC 13).

In short, to quote the words of Lord Reid in *Anisminic case (supra) at page 171 which have been cited by the Federal Court in the case of Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [*1984] 1 MLJ 363, [1984] 1 CLJ (Rep) 155 although the Industrial Court "had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity... It may have made a decision which it had no power to make... It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account ..."

Applying these to the ruling dated 26 August 1981 I hold that the Industrial Court had acted in excess of jurisdiction when it (a) had taken into account matters which it ought not to have taken into account, (b) had refused or neglected to consider matters which it was required by law to consider, (c) had wrongly equated "servant" and "employee" with the word "workman" and lastly, (d) had asked itself the wrong question when dealing with the matter before it. Since the Industrial Court had acted in excess of its jurisdiction when it made the ruling on 26 August 1981 it follows that its decision was a nullity and that section 33B(l) of the Act has no application. In such a case, the power of the High Court to interfere is not an appellate authority to override the decision of the Industrial Court but as a judicial authority which is concerned, and concerned only, to overseer whether the inferior tribunal of limited jurisdiction has contravened the law by acting without jurisdiction or in excess of the limited powers which Parliament has confided in it.

Since the question whether or not a Company Director can be a workman within the meaning of the Industrial Relations Act 1967 (as amended) had been fully argued before the Industrial Court and in the High Court, I can now proceed to give my opinion on the matter.

Now, the Industrial Relations Act 1967 (as amended) is "An Act to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom". The Act postulates a dispute between an employer on the one side and a workman on the other side. The limitation placed upon the employer is not with regard to all his employees: the limitation is confined to a limited class of his employees and that limited class is constituted by the expression "workman". If the employee is not a .'workman" within the meaning of the Act then the contractual rights and liabilities of the employer are not limited or restricted. Then comes the lawyer's question: Who is a workman?

Section 2 of the Act statutory defines a "workman" to mean any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute. "Contract of employment" has also been included in the definition clause and means "any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman". In *Dr. Dutt case (supra)* the Federal Court held that the question whether a person was or was not a "workman" is a question of mixed fact and law and I agree with this view. However, if the parties had entered into a contract of employment and if all the terms and conditions of the employment had been reduced into writing and if there was no dispute as to its *bona fide* then the true relationship of the parties would have to be gathered from the four corners of the written document. (see *Australia Mutual Provident Society case (supra)).* Needless to say, the onus of proving that he is a "workman" within the meaning assigned to it by section 2 of the Act rests on the person who claims it.

In considering this perennial question the Industrial Court must always bear in mind that they must be guided by the relevant definition clause contained in section 2 of the Act. But the definition clause itself presents some difficulty of construction because, in my view, the definition of "workman" is not complete. There is therefore no real statutory definition of the word "workman" in the Act. Learned Counsel for the first respondent seemed to have recognized this and urged the Court to give the word a wide meaning to include a company director. On the other hand, learned Counsel for appellants argued that "workman" ought to be given a limited and restricted interpretation otherwise the Industrial Relations Act 1967 (as amended) would be unworkable.

There are many instances where general words in a statute are given a narrow meaning. That is done, not only when there is something in the statute itself which requires it, but also where to give the general words its apparent meaning would lead to conflict with some fundamental principle or startling result. Such a proposition appears to find some support in the case of *Bird v. O' Neal* [1960] AC 907. Dealing with a trade dispute involving the dismissal of a shop assistant one of

the questions to be considered was whether the shop assistant was a "workman" under the Leeward Islands Trade Unions Act 1939 and the Privy Council said at page 925:

> On the contrary, the subject-matter would seem to their Lordships, in the absence of words of limitation, to call for a wide and literal interpretation which should not exclude shop assistant.

In other words, the tendency of the Industrial Court would appear to give the word "workman" in a trade dispute a wide meaning unless there is something in the definition clause in the Act to limit or restrict such a construction. Indeed, such a limitation appears to be found in the definition of the phrase "contract of employment" where it is expressly provided that (a) the employer must agree to employ the person as a workman and (b) that person must also agree to serve his employer as a workman. I am therefore unable to accept the submission of learned Counsel for the first respondent that I ought to give the word "workman" a wide meaning.

In my opinion, Parliament has advisedly made the definition vague leaving it to the Industrial Court initially and ultimately the High Court by way of proceedings for an order of Prohibition or *Certiorari,* to determine the extent of the question or meaning.

It is pertinent to note that the relationship envisaged by the Act is that between employer and workman and not between employer and employee or master and servant. This distinction is deliberate and important, and should always to be borne in mind when construing the word "workman".

If Parliament had intended that an "employee" would include a "workman" under the Act it would have said so expressly and would define "contract of employment" differently to mean any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee. The fact that Parliament did not do so is, in my opinion, due partly to the fact that the term "employee" has now appeared to acquire a much wider meaning and connotation than the word "workman". This can be seen from the Industrial Tribunal cases decided in England after the Second World War. In my opinion, and in the language of an ordinary person, a "workman" may be restricted to subordinate employee of a company.

In the case of *Australia Mutual Provident Society v. Allan & Anor*. [1978] 52 ALJR 407 the Privy Council held at p. 409 that the contracting parties cannot alter the truth of their relationship by putting a different label on it. And if their relationship is ambiguous the parties can remove that ambiguity by the very agreement itself which they have made with one another. The Agreement itself then becomes the best material from which to gather the true legal relationship between them.

The main facts of this case do not appear to be in dispute and may be stated shortly.

On 23 January 1977 the first respondent was offered the post of Director in Industrial, Agricultural and Motor Associates Sdn. Bhd. He accepted the offer and on 25 June 1977 the appellants and the first respondent executed a Director's Contract

of Employment to serve the appellants as well as subsidiary/associate companies of the appellants in Malaysia, Singapore, Brunei and Indonesia. Clause 8 provided that The General Conditions of Service for Expatriate Staff - a document containing detailed terms and conditions of employment applicable to all expatriate staff in the employ of the appellants - shall be deemed to form part of the contract of employment. The first respondent was duly appointed Director of Industrial & Agricultural Distribution Sdn. Bhd and Motor Associates Sdn. Bhd. Clause 10 stated that the appellants may terminate this Agreement without reason being given to the Director by giving six months' notice or six months' salary in lieu thereof. The employment of the first respondent was terminated by the appellants on 3 December 1979 and he then made representations to the Director-General of the Ministry of Labour' under section 20(1) of the Industrial Relations Act 1967 (as amended) and the Minister of Labour referred the matter to the Industrial Court under subsection (3) of section 20 of the Act.

The document signed by the appellants and the first respondent on 25 June 1977 was called a Director's Contract of Employment. Not every contract of employment would constitute the person a workman. As a matter of law it is not every contract of employment that constitutes a person a workman under the Act since the definition clause expressly stipulates that it must be a contract of employment whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman (see *Simmons v. Heath Laundry Company (supra) at p. 547 per Fletcher Moulton LJ).*

I come now to consider the Director's Contract Of Employment dated 25 June 1977. Under the terms and conditions of this document it is patently clear and it was conceded by learned Counsel for the first respondent that the first respondent was employed by the appellants to carry out -the duties and functions of a Company Director. The question is whether a Company Director includes a "workman" within the meaning of section 2 of the Industrial Relations Act 1967 (as amended). I have already said that the Act postulates that there should be an employer on the one side and workman on the other side. A Company Director has been said to representing the directing mind and will of the company, the very ego and centre of the personality of the company *(Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] AC 705 per Viscount Haldane LC at page 713 and Denning LJ in *H.L. Bolton (Engineering) Ltd. v. T. J. Graham & Sons Ltd.* [1956] 3 All ER 624).

A company Director may not be regarded as a "servant" of the company (*Re T.N. Farrer Ltd.* [1937] 2 All ER 505 per Simonds J and Eve J in *Re Le Behrens & Co. Ltd.* [1932] 2 Ch 46). A director is not a servant (see *Hutton v. West Cork Ry Co.* [1883] 23 Ch D 654, per Bowen LJ).

If a company director is to be regarded as representing the mind and will of the company and may not be treated as a servant of the company it would be strangely out of date (to borrow a phrase of Viscount Simon LC in *National Association of Local Government Officers v. Bolton Corporation* [1942] 2 All ER 425 @ p. 435) nowadays to urge the Industrial Court to construe a company director, in the more complex conditions of modern companies, to include a "workman". Such a construction would place the company director in conflict with his duties and loyalty

towards his employer and the company whom he represents. The proposition has only to be stated in order to make one realise how untenable it is. I am unable to accept it. In short, the simple test appears to be this: If a person or a company director can be regarded either expressly or by necessary implication, as representing the company in the course of the trading activities of the company, he ought not to be treated as a workman under the Act. Some support for this proposition may be found in *Bolton Engineering case (supra)* at page 630 where Denning LJ said:

> Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these directors and managers is the state of mind of the company and is treated by the law as such.

On the facts of this case I hold that the first respondent had failed to bring his case within this test and the Industrial Court ought to have ruled that the first respondent was not a "workman" within the meaning assigned to the word contained in section 2 of the Industrial Relations Act 1967 (as amended). When the Industrial Court purported to hold that the first respondent was a "workman" under the Act, in my opinion, the Industrial Court had acted in excess of its jurisdiction and therefore the ruling was a nullity.

Prohibition is a remedy at least generally intended to prevent an excess of jurisdiction not the risk of its being erroneously exercised, particularly where consideration of fact may be material (Bolton Corporation case (supra) per Viscount Simon LC at p. 435). However in The Queen v. Federal Court of Australia, Ex parte W.A. National Football League [1978-79] 143 CLR 190 Barwick CJ after stating that the grant of prohibition is an exercise of original jurisdiction and not part of the appellant process, continued:

> Prohibition to restrain the commencement or continuation of proceedings is an appropriate remedy to be granted for manifest want or excess of jurisdiction. It may be granted before a decision has been given or it may be granted thereafter to restrain proceedings upon the decision or order.

And I have already held that the ruling of the Industrial Court dated 21 August 1981 was made in excess of jurisdiction.

Since the ruling of the Industrial Court was held to have been made in excess of jurisdiction and therefore a nullity, it was submitted by learned Counsel for the appellants, relying on a dictum of Lord Roskill in the case of *Harrington v. Roots* [1984] 2 All ER 474 that it was in fact unnecessary for the appellants to apply for an order of certiorari in the High Court. At p. 480 of Harrington case (supra) Lord Roskill said:

> Since in my view these orders were a nullity I do not think that it would have been right to order certiorari to issue as well.

I like to point out however, that Harrington case (supra) was concerned with proceedings in the Magistrate's Court and I think this case may be distinguished from decision or order made by the Industrial Court, an inferior tribunal set up under the Industrial Court Act 1967 (as amended). I would like to keep this point open for final decision when it arises at some future date.

For the above reasons, I would allow the appeal, set aside the judgment of the High Court and order that prohibition be issued restraining the second respondent, the Industrial Court from proceeding and continuing with Industrial Court Case No. 136 of 2980.

In the exercise of my discretion, I order that each party shall pay its own costs here and in the High Court.

Also found at [1985] 2 CLJ 305